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Remarks

MR Executive Secretary
15 May 86
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PANEL ON THE LAW OF OCEAN USES

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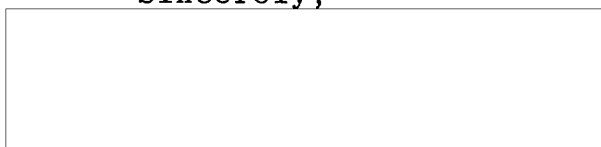
April 21, 1986

Dear Colleague:

I draw your attention to the attached statement on United States Policy on the Settlement of Disputes in the Law of the Sea. This statement is the result of a study by an independent panel of citizens, recognized experts on ocean law. It further develops the recommendations conveyed to you in our statement of May 17, 1985, on United States Policy on Coastal Areas in the Sea and the Settlement of Disputes.

A copy of our statement is being transmitted to the President of the United States and to the heads of appropriate departments of the government.

Sincerely,



Chairman
Panel on the Law of
Ocean Uses

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Attachment



The panel on the law of ocean uses is an independent group of specialists in oceans law and policy sponsored by Council on Ocean Law.

1717 Massachusetts Avenue, N.W., Suite 302, Washington, D.C. 20036 (202) 462-3737

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PANEL ON THE LAW OF OCEAN USES

U.S. Policy on the Settlement of Disputes in the Law of the Sea

In 1983, President Reagan announced the policy of the United States to accept the normative provisions of the 1982 Convention on the Law of the Sea as reflecting the customary international law of the sea (in matters other than deep seabed mining).

Giving effect to that policy requires scrupulous respect for the provisions of the Convention by all agencies of the United States. It requires attentive scrutiny by the United States to assure compliance with those provisions by other countries. That policy, we are persuaded, requires also that there be put in place "machinery" for prompt and peaceful resolution of disputes, notably those relating to navigation and overflight, and to protection against pollution in the coastal seas.

We recommend that the United States formally announce its willingness to accept, on condition of reciprocity, the obligation to submit to third-party arbitration or adjudication, disputes regarding the interpretation and application of the rules affecting navigation, overflight and pollution, as set forth in the Convention, in the same respect and to the same extent as is required of parties to the Convention. An early declaration to that effect by the President should be supported promptly by appropriate Congressional action and accompanied by efforts to encourage other countries to assume similar obligations.

The U.S. Interest in Compulsory Dispute Settlement

Much of the law of the sea today consists of principles of accommodation between the particular interests of coastal states and those of other states exercising their freedom of navigation and overflight. Those principles were agreed after extended negotiation and in major respects they were found acceptable,

both to coastal states and to maritime states, only because they were accompanied by procedures for the settlement of disputes. For example, certain coastal state rights, such as control of pollution from ships, were accepted in the Convention on the assumption and condition of compulsory arbitration or adjudication. The privilege given a flag state to transfer certain pollution enforcement proceedings from coastal state courts to flag state courts probably would not have been accorded by the Convention if the flag state were not under a duty to control pollution from its ships that is enforceable through arbitration or adjudication.

In coastal areas, the coastal state has the power and numerous opportunities and temptations to bring pressure on navigation. Maritime states need assurance that coastal states will not attempt

- to use their general control of the territorial sea, and the right to take specific measures there, such as establishing safety zones or operating offshore installations, to hamper navigation and overflight;
- to use their authority over economic activities in the exclusive economic zone to restrict navigation;
- to use their authority to prevent pollution from ships in all zones of national jurisdiction -- the territorial sea, international straits, archipelagic waters, or the economic zone -- to control navigation in those areas;
- to expand the size of various zones of coastal states jurisdiction and the scope of their authority there.

The accommodations between coastal and maritime interests regarding navigation, overflight and environmental protection, reflected in various provisions of the Convention, will be subject to continuing pressures. Sometimes there will be confrontation; sometimes there will be acquiescence, as states grow reluctant to expend political, economic or military capital to protect their interests and the balance achieved in the Convention from corrosive precedents. A compulsory and binding system of third-party settlement of disputes provides a "third option." Such an arrangement will induce greater self-restraint, encourage officials to seek legal

advice before acting, and will impel lawyers to be cautious in their advice. Dispute settlement arrangements also provide a state that has acted in violation of the rules with a graceful retreat: it need not yield to pressure from another state, only to the rule of law as embodied in the binding judgment of a disinterested tribunal. A dispute settlement arrangement permits a state confident that it is acting within its rights to seek judgment confirming and vindicating its actions.

For the United States, in particular, stability and the security of its interests at sea depend on the willingness of other states, particularly coastal states, to agree to fair means for settling disputes that might not be resolved through direct diplomatic negotiation. United States representatives summed up the situation a decade ago: "a system of compulsory, impartial third-party adjudication is thus an essential element of the overall structure" for an international law of the sea.

Established dispute settlement arrangements are of particular importance to the United States in present circumstances. Especially since the United States has not adhered to the Convention, but will be asserting rights of navigation vis-a-vis other coastal states like those provided in the Convention, it may meet resistance from some coastal states, and United States determination may entail some risk of political, economic, or even military conflict. We believe that it is preferable to minimize the circumstances in which, if diplomacy fails, the United States is forced to choose between concession and conflict. It was for that reason that the United States took the lead in seeking a system of compulsory third-party settlement of disputes in the framework of the Convention. We believe that arrangements for compulsory dispute settlement are in the interest of the United States even if -- perhaps especially if -- it is not party to the Convention. If some states, resentful of U.S. failure to adhere to the Convention, are tempted to resist including the United States in dispute settlement arrangements, they might be reminded that U.S. acceptance of Convention rights valuable to them, such as coastal state rights in the Exclusive Economic Zone, or coastal state implementation of international pollution standards or the right of flag states to remove pollution enforcement proceedings to their own courts, may depend on such dispute settlement arrangements.

The compulsory settlement of disputes in the sea will serve both public and private interests in the United States. The nation has overall security, economic and environmental interests in encouraging states to behave in accordance with the requirements of the Convention regarding navigation, overflight, and

pollution, and in resisting occasional temptations on its own part to set adverse precedents by doing otherwise. Dispute settlement is also in the particular interest of U.S. citizens and companies. Shipping and petroleum companies, airlines, importers and exporters, travelers and consumers, would be served by having compulsory dispute settlement procedures available in order to discourage unlawful detention of ships and aircraft and to obtain their prompt release in the event of arrest. Workers and labor unions as well as employers have an interest in dispute settlement arrangements to protect the crews of such ships and aircraft against abuse: For example, the Convention provides that only monetary penalties, and not imprisonment, may be imposed for a pollution violation by a foreign ship in the economic zone; there is also a broad provision that "recognized rights of the accused" must be observed in the conduct of proceedings for such a violation. [Art. 230, paras. 1, 3]. The general interest of the United States in advancing human rights also would be served by having international tribunals interpret and apply this provision. Environmentalists (and environmentally sensitive companies) have an interest in dispute settlement procedures in order to encourage both flag states and coastal states to fulfill their substantial environmental obligations under the Convention. Dispute settlement of marine pollution issues will also promote uniform interpretation and enforcement of international environmental obligations generally as an alternative to the often ineffective or inefficient patchwork of national regulations.

The dispute settlement arrangement of the Convention is highly flexible and offers the United States a number of options:

- (a) arbitration in all cases;
- (b) arbitration in some cases of special importance to the United States;
- (c) use of the International Court of Justice in all cases;
- (d) use of the Court in some cases;
- (e) use of the International Tribunal on the Law of the Sea established by the Convention in all cases; and
- (f) use of the Tribunal in some cases.

We need not fear being compelled to adjudicate issues arising out of military activities since the Convention specifically authorizes the exclusion of such activities from the dispute settlement scheme. Of these procedures, only the International Tribunal on the Law of the Sea is a permanent institution

established by and linked to the Convention. Its use is not required, but it is an option open even to non-parties to the Convention, and the United States may wish to consider its use at least for securing prompt release of detained vessels. Use of this Tribunal or of the International Court of Justice, is consistent with the policy of the United States to accept third-party settlement of disputes on particular issues on the basis of agreement with other states.

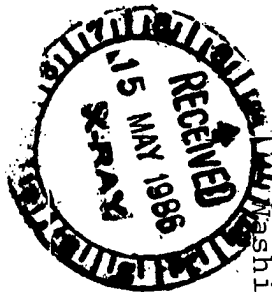
Giving Effect to Compulsory Dispute Settlement

U.S. participation in dispute settlement can be achieved by various means, including

1. dispute settlement agreements with other countries concluded (a) as treaties with the advice and consent of the Senate, or (b) as executive agreements pursuant to authority granted by Congress.
2. Congress might approve U.S. acceptance of compulsory dispute settlement on condition of reciprocity and subject to such other terms or limitations as may be found necessary. For example, using the reciprocating states provisions of the 1980 Deep Seabed Hard Minerals Resources Act (30 U.S.C. §1488) as a model, an act of Congress could specify the conditions for U.S. acceptance of the dispute settlement provisions of the Convention, and authorize the Secretary of State to designate a foreign state as "a reciprocating state" if he finds that that state has accepted the dispute settlement provisions of the LOS Convention in relation to the United States.

Agreement to compulsory dispute settlement on navigation and overflight and pollution issues to the extent required by the Convention would enhance our ability to achieve the goals of the oceans policy outlined by President Reagan in his statement of March 10, 1983. It would underscore the seriousness of our desire to ensure that we and others behave in accordance with the provisions of the Convention regarding navigation, overflight and pollution, and to promote and maintain the rule of law at sea.

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